sentative character into the state, so that service on him was sufficient service on the foreign corporation.

A number of states have passed statutes providing that until the foreign corporation does file in the required public office the proper power of attorney authorizing specified persons to receive service of process against it, such process may be served on a specified public official, who shall send the process by mail to the corporation at its home address, as near as he can ascertain it, and that process so served shall be deemed served on the corporation. Such a statute, providing that the process might be served on the register of deeds of the county where the foreign corporation was doing business and had its principal office, and that such service should be deemed to be service on the corporation, was held unconstitutional in Wisconsin, on the ground that such public officer could in no just sense be said to represent the corporation, that notice to him was not notice to the corporation, that the state did not possess power to declare arbitrarily who should be deemed to be the agent of the corporation, and therefore the judgment rendered on such service was void for want of personal service of process on the defendant. *Pinney* v. *Providence Loan and Investment Co.* (1900), 106 Wis. 396, 82 N. W. Rep. 308, 80 Am. St. Rep. 41.

On the other hand, the North Carolina Supreme Court recently held that a statute of that state providing that until such power of attorney was filed all process might be served on the state commissioner of corporations, was valid. *Fisher* v. *Traders' Mut. Life Ins. Co.* (1904), 136 N. C. 217, 48 S. E. 667.

The latest expression on the question that we have discovered is by the Supreme Court of West Virginia, sustaining mandamus against a non-resident domestic corporation to compel it to authorize the state auditor to receive service of all process against it, and to pay him the statutory fee of ten dollars for such services, and holding that the statute which required all foreign corporations doing business in the state, and all domestic corporations not having their principal office in the state, to authorize service of process on the state auditor and pay him for such service was not unconstitutional, as depriving the corporation of its property without due process of law, nor because it required the corporation to appoint one to receive service of process on it that did not represent it in any way, nor because it deprived the corporation of the right of contract and choice of its agents. By BRANNON, P., SANDERS, J., dissenting. *State* v. *St. Mary's Franco-American Petroleum Co.* (1905), — W. Va. —, 51 S. E. Rep. 865. J. R. R.

CREDITORS' RIGHT TO HOLD SHAREHOLDERS LIABLE ON CORPORATE STOCK ISSUED FOR PROPERTY VALUED ON THE BASIS OF PROSPECTIVE PROFITS.—The recent case of *See* v. *Heppenheimer*, — N. J. Ch. —, 61 Atl. Rep. 843, decided by VICE CHANCELLOR PITNEY, in a luminous opinion, if not disturbed by the Court of Errors and Appeals, will go a long way to correct what have been serious and not unusual abuses in the organization of many corporations under the New Jersey laws.

The suit was brought by the receiver of the Columbia Straw Paper Company against the shareholders to recover unpaid stock subscriptions

necessary for the payment of debts. In 1892, there were, in the Central States, from Ohio to Nebraska, from 40 to 70 mills engaged in the manufacture, from rye and oat straw, of wrapping paper used by butchers and grocers. Owing to excessive competition the business was not prosperous. One Stein, of Chicago, learning the facts, along with a Mr. Beard, of Buffalo, conceived the notion of consolidating these into one corporation. They brought the matter to the attention of Mr. Samuel Untermeyer, a lawyer of large experience in organizing such corporations. The three formed the plan to share jointly in the profits of the enterprise; each was to raise one-third of the necessary funds, and Mr. Untermeyer's law firm was to receive $50,000 for its services. Mr. Untermeyer drew up an option agreement whereby the owners of the mills proposed to convey the property and good-will of the business, including trade marks and trade names with a covenant not to engage in the business within five years, for a certain amount of cash, and so much of the preferred and common stock in a corporation formed under the New Jersey laws, with $1,000,000 preferred stock, $3,000,000 common stock and $1,000,000 bonds secured by a mortgage on the plants conveyed to the corporation. Mr. Stein set about securing the options, and by October had obtained such options, to expire January 1, on 39 plants, to be paid for by $750,000 cash, $750,000 in preferred stock of the corporation, and $1,500,000 of the common stock at fifty cents on the dollar,—making the agreed purchase price $2,250,000. The three promoters then undertook to raise the money necessary to pay the cash required, and offered $1,000 in mortgage bonds, $200 of preferred stock, and $400 of common stock for each $1,000 received in cash. Mr. Untermeyer took $50,000 of bonds with the bonus of stock for the fees of his firm, and he and his friends took $467,000 in bonds on the same basis. All of this was done before the organization of the corporation, and was made possible by a prospectus setting forth the condition of the industry; that the cost to manufacture the paper was $18 per ton; the selling price was then $21 per ton; 90,000 tons were used annually, and if a monopoly was secured, the price could be raised to $28, and a profit of $900,000 per year realized. In addition to this a confidential circular stated that the vendors and their friends retained $800,000 of the preferred, and $2,600,000 of the common, stock; $1,000,000 bonds were to be sold for cash with a bonus of stock as above, and $750,000 of the cash was to be paid to the vendors, "being about one-third of the appraised value of the property," $200,000 kept for working capital, and $50,000 for legal fees. The company was incorporated by Mr. Untermeyer's Private Secretary, Mr. Beard, and Mr. Heppenheimer, each of whom took 4 shares; they elected themselves and 6 others (all clerks in Mr. Untermeyer's office) directors, and one share of stock was issued to each, who never paid anything thereon. At the first meeting of directors, an elaborate proposition of sale, prepared by Mr. Untermeyer, was presented by Mr. Stein to the company to sell all of the 39 plants for which he held options, for $5,000,000, — $1,800 in cash, $1,000,000, 6 per cent. mortgage bonds, $1,000,000 preferred stock, and $2,998,200 in common stock. The proposition was immediately accepted in a series of resolutions previously prepared by Mr. Untermeyer, who was present and directed the proceedings.

Within a week this board of directors, except Mr. Beard and Mr. Heppenheimer, resigned, and others were elected, five of them being former owners or managers of mills purchased. The corporation began operations early in 1893; they raised prices, and other mills were started; wood pulp came into use; the managers did not agree; the financial depression came; fire destroyed some of the mills, — all soon went to rack and ruin; foreclosures began; the property all shrunk in value, and many creditors could not be paid out of the company's property, and the day of reckoning for the promoters and shareholders came, to be worked out in this case. The statutes provide that "where the whole capital of the corporation shall not have been paid in, and the capital paid in shall be insufficient to satisfy the claims of creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the company or such proportion of that sum as shall be required to satisfy the debts of the company." Also that "the directors * * may purchase manufactories or other property necessary for their business * * * and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments."

Defendants claimed that the corporation purchased from Stein the mills for $5,000,000, for which the stock and bonds were issued; the creditors replied that Stein was a mere figurehead, acting for himself, Beard and Untermeyer, as promoters of the company, for which the property, including good-will, was in fact purchased for $2,250,000. The court says, taking the view most favorable to the defendants, the question is, "Can *prospective profits,* however promising, be considered as *property* as that word is used in the statute as above quoted?" To this the court answers: "The word 'property' must evidently be construed by its context, which refers to something visible and tangible and necessary for the business," and stock only to the value thereof can be issued therefor. The defendants justify their valuation, because (1) it was made in good faith, and (2) includes good-will. To the first it was replied that the good faith rule did not apply when the thing valued was not 'property'; that the good faith alleged will not stand the test of close scrutiny; and that there was no appraisement of the property by a competent board of directors.

As to the *good-will,* the court admitted it was "an element of value quite as important as,—in some cases perhaps far more important than—the plant or machinery with which the business is carried on," and that it can be justly included in the value of property for which stock is issued, as has been held. *Merchants Ad-Sign Co.* v. *Sterling,* 124 Cal. 429, 71 Am. St. R. 94, 46 L. R. A. 142 (1899); *Washburn* v. *National Wall Paper Co.,* 81 Fed. Rep. 17, 2 WILGUS' CORP. CAS. 1936 (1897); *Wilmer* v. *Thomas,* 74 Md. 485, 13 L. R. A. 380 (note).

In this case, however, the individual good-will of the different properties was included in the $2,250,000 to be paid for them; Mr. Stein had no other good-will to convey; and the new corporation had not yet acquired any, so the question again is, is "the speculative good-will," dependent on

prospective and contingent profits, due to good management and the general course of business of the country, property? The court says: "It seems to me there can be but one opinion as to the soundness of the notion that profits derived, or to be derived, from the prosecution of any business can be properly taken into account, except to a limited extent, in estimating the value of the mere inanimate instrument which is used in conducting that business; * * * an instrument which produces something of great value at little cost is of itself of value, which however is limited by the cost of reproducing the instrument itself."

It was argued that this was an usual practice, which the court admitted, but added "it has brought obloquy upon our state and its legislation, * * * and it has involved a clear infringement of, if not a fraud upon, the plain letter and spirit of our legislation."

As to *good faith,* it was found that it went no further than getting in on the ground floor by getting a $1,000 bond secured by a first mortgage on property of twice the value, for each $1,000 cash paid in,—with a bonus of 60 per cent. in stock which it was hoped and expected would receive dividends long enough "to be distributed to," and later on, to be "digested by the public"; this sort of good faith is not that which is required to legalize such transactions. It was argued the defendants had lost $400,000 cash; to which it was answered that those who do business under the shield of corporate existence, avoid personal liability, enjoy all the gain if prosperous, and lose only their original investment if unsuccessful, the unfortunate creditors bearing the additional loss; the investors should not complain if the creditors demand that the original statement of the capital stock be made good; simple justice and common honesty require the law to be so enforced against these defendants.

Again, the court points out that Stein, Beard, and Untermeyer were promoters, and as such it was their duty to furnish the corporation with competent and independent directors; to disclose their position as vendors, to tell the actual cost of the properties, and to invite investigation as to their value, instead of concealing information on these last two points; the contract of purchase from Stein was a palpable fraud on the Act of the Legislature and operated as a fraud on the future stockholders and the creditors, and there was no honest judgment of the directors as to the value of the property.

Further, the offer to disgorge and turn back to the company the stock which proved valueless, "evades the real question, which is whether the defendants have received certificates of stock for which they have not paid,"—as required by the statute which "is a simple expression of the common law that the unpaid subscriptions to the capital stock of a corporation form an asset for the payment of the debts thereof"; and the fact that none of the defendants made an actual subscription to the stock which he received is unimportant, for "in equity, and as against creditors, the acceptance of the stock without paying for it, places the acceptor in the position of a subscriber."

The court does not discuss, nor rely greatly upon former decisions, but considers the case in a very straightforward way upon principle. The prin-

cipal cases referred to are *Washburn* v. *National Wall Paper Co., supra; Donald* v. *Smelting Co.,* 62 N. J. Eq. 729, 48 Atl. Rep. 771; *Woodbury Heights Land Co.* v. *Londenslager,* 55 N. J. Eq. 78, 91, 35 Atl. Rep. 436, 56 N. J. Eq. 411, 41 Atl. Rep. 1115, 58 N. J. Eq. 556, 43 Atl. Rep. 671; *Plaquemines Tropical Fruit Co.* v. *Buck,* 52 N. J. Eq. 219, 27 Atl. Rep. 1094; *Weatherbee* v. *Baker,* 35 N. J. Eq. 501; *Handley* v. *Stutz,* 139 U. S. 417, 11 Sup. Ct. R. 530, WILGUS' CORP. CAS. 1923; *Clark* v. *Bever,* 139 U. S. 96, 11 Sup. Ct. R. 468; *Richardson* v. *Green,* 133 U. S. 30, 10 Sup. Ct. R. 280.

Much litigation between other parties in relation to this company has already occurred. See *Northern Trust Co.* v. *Columbia Straw Paper Co.,* 75 Fed. Rep. 936; *Dickerman* v. *Northern Trust Co.,* 80 Fed. Rep. 450, 176 U. S. 181, 20 Sup. Ct. R. 311.

Ever since the decisions in *Van Cott* v. *Van Brunt,* 82 N. Y. 535, WILGUS' CORP. CAS. 1919 (1880), and *Handley* v. *Stutz* (1891) supra, were rendered it has been considered lawful to issue stock at an overvaluation even as against subsequent creditors to pay for construction that cannot otherwise be paid for, or to save a 'going concern' that cannot otherwise be rehabilitated. So, too, recently, profits, present and prospective, have been recognized as important elements in the valuation of property for the purpose of taxation. *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 166 U. S. 185, WILGUS' CORP. CAS. 1381 (1897). In the development of patents, copyrights, and mining properties, speculative profits have been recognized as a proper basis of valuation of property for which stock is issued, even as against subsequent creditors. *In re South Mountain Consolidated Mining Co.,* 7 Saw. 30, 8 Saw. 366 (1881-2); *American Tube and Iron Co.* v. *Hays,* 165 Pa. St. 489, 30 Atl. Rep. 936 (1895); *Graves* v. *Brooks,* 117 Mich. 424, WILGUS' CORP. CAS. 1950 (1898). This practice is vigorously defended by a recent work by T. G. Frost, A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS, pp. 125-136. Such doctrine is, however, criticised by Judge Thompson in 2 CORPORATIONS §§ 1665-76. The 'true value' and 'good faith' rules are clearly noted, with the cases collected and classified in *State Trust Co.* v. *Turner,* 111 Ia. 664, 53 L. R. A. 136, 82 N. W. Rep. 1029, WILGUS' CORP. CAS. 1943 (1900).

We believe the true rule on matters of this kind, should be that stated by CHIEF JUSTICE FULLER in his dissenting opinion in *Handley* v. *Stutz,* supra,—no "arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure of the enterprise," should be sanctioned by the courts. H. L. W.

HEIRS AS GRANTEES WITH MIXED ESTATES OF ENTIRETY TO PARENTS.—Several recent decisions emphasize in a peculiar way the wisdom of Lord Coke's advice to avoid studiously any departure from the accustomed forms of expression in all deeds of conveyance. Perhaps these remarks are out of place in a lawyer's magazine, as most lawyers are sufficiently careful in that matter at all times. Perhaps they might better be addressed to the layman and the justice of the peace, with the addition that it is cheaper to pay a few shillings more and have a lawyer draw the deed than to pay many dollars later in